

BEFORE THE
Federal Communications Commission
 WASHINGTON, D.C. 20554

AUG 10 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)
 of the Communications Act -
 Competitive Bidding

PP Docket No. 93-253

To: The Commission

**REQUEST FOR WITHDRAWAL OF
 PETITION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR DECLARATORY RULING**

Bastion Capital Fund, L.P. ("Bastion") hereby requests withdrawal of the attached Petition for Reconsideration Or, In the Alternative, For Declaratory Ruling filed January 6, 1995. Bastion makes this request in light of the Commission's elimination of bidding credits for entities controlled by members of minority groups and/or women. Bastion requests withdrawal of its Petition without prejudice to its right to renew its arguments in the event that the Commission decides in the future to adopt rules favoring members of minority groups and/or women.

Respectfully submitted,

BASTION CAPITAL FUND, L.P.By: 

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August 10, 1999

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PETITION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR DECLARATORY RULING

Bastion Capital Fund, L.P. ("Bastion") hereby petitions for reconsideration of or, in the alternative, seeks a declaratory ruling with respect to the Commission's Fifth Memorandum Opinion and Order in the Competitive Bidding Rule Making, PP Docket No. 93-253 (released November 23, 1994). Bastion seeks a ruling that it would qualify as a sole "control group" member of a "business owned by members of minority groups and/or women" under Section 24.720(c), because the ultimate economic beneficiaries of its fund are over 67 percent women and minorities. Furthermore, the ultimate beneficiaries of the Bastion Fund are primarily ordinary, middle-class Americans, who are no less deserving of a break from the Government than the wealthy entities and individuals favored with special treatment in the Fifth Memorandum Opinion and Order.

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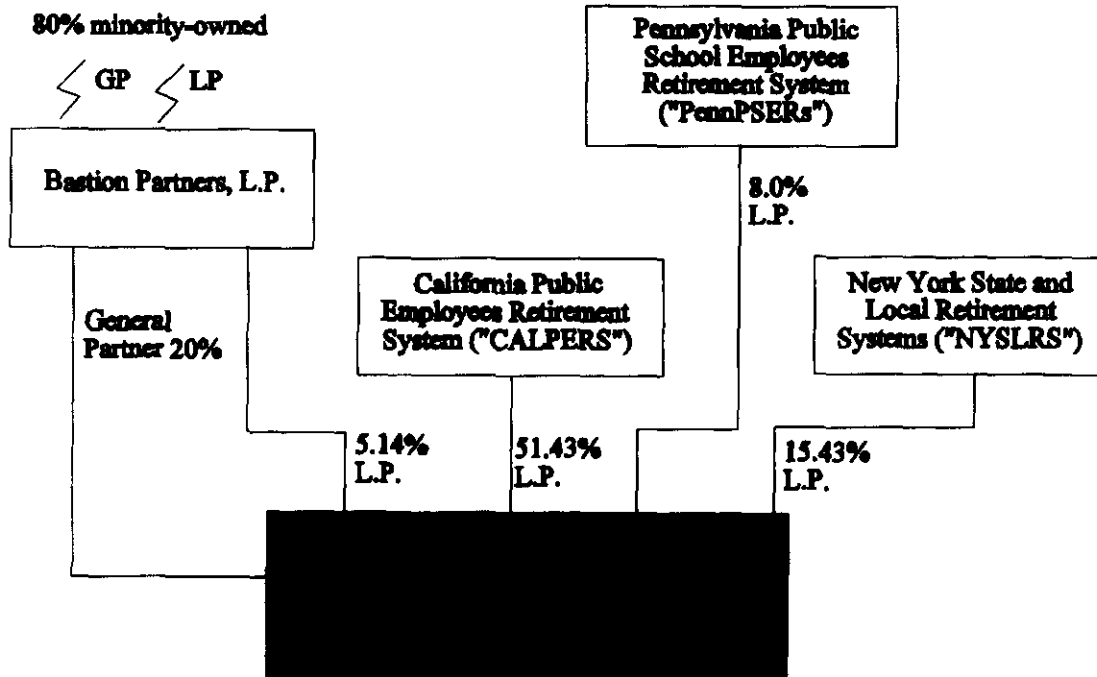
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Under Section 24.720(c), which also incorporates Sections 24.709(b)(5) and 24.709(b)(b), an applicant qualifies as a "business owned by members of minority groups and/or women" if, among other things: (1) the "qualifying investor" members of its "control group" are members of minority groups and/or women who are United States citizens; (2) such "qualifying investors" have both *de jure* and *de facto* control of the applicant; and (3) such qualifying investors hold at least 60 percent of the control group's equity. A "qualifying investor" is someone whose "gross revenues" and "total assets," when aggregated with the gross revenues and total assets of other attributable investors and affiliates, do not exceed the gross revenues and total assets limits of Section 24.709(a)(1) (less than \$125 million gross revenues in each of the last two years and less than \$500 million in total assets).

As previously described in comments filed in this proceeding, Bastion is a minority-controlled Venture Capital Operating Company formed for the primary purpose of investing in minority and women-owned business. By law, it is required to invest at least 50 percent of its assets in operating companies in which it "has or obtains management rights." See Bastion's Ex Parte Comments on Petitions for Reconsideration (filed Oct. 12, 1994).

Bastion is structured as limited partnership. Its ownership is as illustrated on the following Figure 1:

FIGURE 1
Ownership of Bastion Capital Fund, L.P.



Minority ownership of Bastion, through its general partner alone, which owns 25.14 percent of the equity and is itself 80 percent minority owned, amounts to 20.1 percent of the equity of Bastion, using the "multiplier" under Section 24.720(n)(3). As indicated above, however, Sections 24.709(b)(5), 24.709(b)(6) and 24.720(c), read together, require that the control group of a minority and/or women owned business be at least 60 percent minority or female owned. Thus, it is necessary to analyze the ownership of Bastion's other limited partners.

As indicated in Figure 1, Bastion's other limited partners are CALPERS, PennSPERS and NYSLRS, which are pension funds administered by state agencies.^{1/} These pension funds do not have "owners" in the traditional sense. Instead, they have beneficiaries, who in essence "own" the fund. CALPERS, NYSLRS and PennPERs have advised Bastion that over 50 percent of their beneficiaries are women and/or members of minorities, as follows:

^{1/} These pension funds qualify as "institutional investors" under Section 24.720(h).

| | Women | Minorities | Combined |
|-----------------|---|------------|--------------|
| CALPERS | over 50%* | over 35%* | over 67.5%** |
| NYSLRS | over 49% of retirees* over 50% of active members* | over 22%* | over 61%** |
| PennPERS | 67.4%*** | 11.5%* | 71.1%** |

* Estimate.

** Combined figure assumes that the overall percentage of women applies to ethnic minority women as well.

*** Actual

Thus, the minority/female ownership of Bastion, on a fully diluted basis, is as follows:

| | Ownership of Fund Equity | Minority/Female % of Partner | Minority/Female % of Fund |
|-------------------------|--------------------------|------------------------------|---------------------------|
| Bastion Partners | 25.14% | 80% | 20.1% |
| CALPERS | 51.43% | 67.5% | 34.7% |
| NYSLRS | 15.43% | 61% | 9.4% |
| PennPERS | 8.0% | 71.1% | 5.7% |
| Total Fund | 100% | | 69.9% |

In other words, applying the multiplier, Bastion is at least 69.9 percent owned by women and minorities.

The FCC's Rules might be read, however, to preclude Bastion from "counting" the minority/female ownership of CALPERS, NYSLRS and PennPERS,

notwithstanding that their beneficiaries are primarily middle class women and minorities. This perverse result is possible as a result of Section 24.720(n)(1), which provides that a "qualifying investor" is someone whose "gross revenues" and "total assets," when aggregated with the gross revenues and total assets of other attributable investors and affiliates, do not exceed the gross revenues and total assets limits of Section 24.709(a)(1) (less than \$125 million gross revenues in each of the last two years and less than \$500 million in total assets). CALPERS, NYSLRS and PennPERS' total assets exceed the \$500 million limitation of Section 24.720(n)(1). CALPERS alone has roughly \$50 *billion* in plan assets. Thus, CALPERS, NYSLRS and PennPERS might not count as "qualifying investors" under Sections 24.709(b)(5) and 24.709(b)(6) or as "qualifying investor members of an applicant's control group who are members of minority groups and/or women" under Section 24.720(c).

Such an interpretation of the Commission's Rules, however, would result in an arbitrary distinction between CALPERS, NYSLRS, PennPERS and other similarly situated government-sponsored entities. For example, the Commission has carved out a special exception for Indian tribes and Alaska Regional or Village Corporations. *See* 47 C.F.R. § 24.720(e)(11)(i). Under this exception, the gross revenues and total assets of Indian tribes and Alaska Regional or Village Corporations are not counted under Section 24.709(a)(2); as a result of this exception, such entities may qualify as "qualifying investors" under 24.720(n)(1). The Commission's only justification for according special treatment to Indian tribes and Alaska Regional or

Village Corporations is that Congress has imposed unique legal constraints on the way such entities can utilize their revenues and assets. *See Fifth Memorandum Opinion and Order* at ¶ 43.^{2/} Pension trusts operate under analogous legal limitations.

While Bastion agrees with Commissioner Barrett's concern about tailoring the rules for particular special interests, *see Fifth Memorandum Opinion and Order*, Separate Statements of Commissioner Andrew C. Barrett, that horse, as they say, is already out of the barn. To wit, the Commission has already created special exceptions not only for Cook Inlet Regional Corporation and other Alaska Regional Corporations and Indian tribes, but also for BET Holdings, Inc. and wealthy minority individuals. *See, e.g.,* 47 C.F.R. §§ 24.709(b)(5)(ii), 24.709(b)(6)(ii) and 24.709(e)(11)(ii). These exceptions have been created without any showing of special need — each of the beneficiaries, e.g., Cook Inlet and BET, are successful, wealthy entities.

State pension funds like CALPERS, NYSLRS and PennPERS are no less deserving of special treatment. The beneficiaries of these funds are ordinary, middle class folks, a majority of who are women and minorities. A substantial part of the "wealth" of these individuals, is the future income they will enjoy from these pension

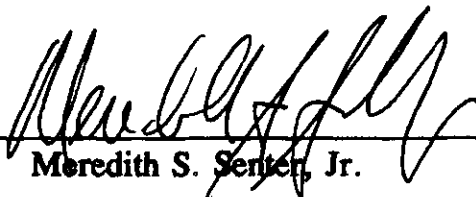
^{2/} There is no evidence that these limitations have in any way restrained the investment activities of Indian tribes or Alaska Regional or Village Corporations or that such entities would need to pledge the shares of their individual shareholders or issue new stock in order to raise capital to participate in PCS.

plans. Ordinary middle class minorities and women are certainly as much entitled to preferential treatment under the Commission's rules for designated entities as the wealthy minority special interests that the Commission favors under its current rules.

Accordingly, Bastion requests the Commission either to reconsider its rules to establish that state pension funds aggregating the retirement savings of women and minority investors may be "qualifying investors" regardless of their total assets, or issue a declaratory ruling to the effect that Bastion, as structured, would qualify as the sole control group member of a business owned by minority groups and/or women under Section 24.720(c).

Respectfully submitted,

BASTION CAPITAL FUND, L.P.

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January 6, 1995

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